

February 24, 2009

Steven D. Ostlie, Senior Counsel
Securian Financial Group, Inc.
400 Robert Street, North
St. Paul, MN 55101-2098

Re: Application of New York Law to Federal Credit Union (FCU) Guaranteed Auto Protection (GAP) Waivers.

Dear Mr. Ostlie:

You have asked if an FCU is engaging in an insurance business under New York state law if the FCU earns a fee by offering GAP waivers to its members for more than the cost of the FCU's GAP creditor insurance coverage. No, GAP waivers are a permissible loan-related activity for FCUs under NCUA's incidental powers rule, regardless of state law limitations. The incidental powers rule also permits FCUs to derive income from these activities.

An FCU's GAP program typically operates in two phases. First, an FCU financing the purchase of a member's automobile offers GAP protection to the member. If the member elects GAP protection, the FCU enters into a debt cancellation contract or GAP waiver with the member. The waiver states that, if the vehicle securing the loan is totaled or stolen, the borrower is released from any obligation to pay the deficiency remaining between the primary insurance settlement and the outstanding loan balance. Second, the FCU purchases a GAP creditor insurance policy to cover each vehicle subject to a GAP waiver signed by a member. The member is not a party to the FCU's GAP creditor insurance policy with its insurance vendor.

As your letter notes, GAP waivers constitute an insurance business under Section 1101(3) of the New York Insurance Law unless: (i) the creditor waives the total gap amount; (ii) the waiver applies only in the event of total loss of the personal property occasioned by its theft or physical damage; and (iii) the charge to the debtor for the waiver does not exceed the cost of the creditor gap insurance coverage. N.Y. INS. § 1101(3) (2008).

FCUs are expressly empowered under the FCU Act to make loans and extend lines of credit. 12 U.S.C. §1757(5). Section 701.21(b)(1) of NCUA's lending regulation provides that NCUA has exclusive authority to regulate the rates, terms of repayment and other conditions of FCU loans and lines of credit. Because a GAP waiver is an agreement affecting the terms of repayment, any

state law purporting to limit or affect an FCU's ability to offer or administer such a product is expressly preempted. 12 C.F.R. §701.21(b)(1)(ii). This office previously concluded in a legal opinion that debt cancellation contracts, including GAP waivers, are not insurance products. See OGC Op. 97-0632 (September 12, 1997); see also, OGC Op. 02-1074 (December 23, 2002); OGC Op. 03-1039 (January 28, 2004). The 1997 opinion relied on a federal appellate court decision holding that, since a national bank may offer debt cancellation contracts under its incidental powers authority, these contracts are not considered the "business of insurance." First *National Bank of Eastern Arkansas v. Taylor*, 907 F.2d 775, 780 (8th Cir. 1990), *cert. denied*, 498 U.S. 972 (1990). Since FCUs are similarly authorized by federal law to offer debt cancellation contracts as incidental to their lending authority, the same analysis applies to FCUs. 12 C.F.R. §721.3(g). Further, a June 17, 2004 opinion by the New York Insurance Department determined it "[w]ill not regulate [debt cancellation contracts] and [debt suspension agreements] made by an FCU" NY Ins. GC Op. 04-613 (June 17, 2004) (available online at <http://www.ins.state.ny.us/ogco2008/rg080422.htm>).

The incidental powers rule expressly permits FCUs to earn income from permissible incidental powers activities, including GAP waivers. 12 C.F.R. §721.6. Therefore, an FCU may earn a fee by offering GAP waivers to its members for more than the cost the FCU incurs to obtain GAP creditor insurance coverage. NCUA does not impose any price controls on GAP waivers and other debt cancellation contracts. FCUs should, however, consult NCUA Letter to Federal Credit Unions 03-FCU-06 for guidance on ensuring effective risk management and control processes over debt cancellation and suspension programs. See NCUA LCU 03-FCU-06 (May 2003).

Sincerely,

/S/

Sheila A. Albin
Associate General Counsel

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